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No. 89-869

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

HENRY HOLT AND COMPANY, INC.,

Petitioner,

—v.—

NEW ERA PUBLICATIONS INTERNATIONAL, ApS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Dated: January 11, 1990

PARTIES TO THE PROCEEDING

The parties before this Court are those set forth in the caption.[1]

1 Pursuant to Supreme Court Rule 28.1, we advise the Court that respondent New Era Publications International, ApS, which is incorporated under the laws of Denmark, is wholly owned by Publications Int, Ltd, which is wholly owned by International Publications Trust, a charitable and religious trust, the beneficiaries of which are religious and charitable organizations affiliated with the Scientology religion.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent New Era Publications International, ApS ("New Era") respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Second Circuit in this case.

STATEMENT OF THE CASE

The petitioner in this matter, Henry Holt and Company, Inc. ("Holt"), was the *prevailing* party on the only issue resolved by the court below—whether respondent New Era was entitled to a permanent injunction under the Copyright Act of 1976, 17 U.S.C. § 502, of Holt's publication of Russell Miller's biography of L. Ron Hubbard entitled *Bare-Faced Messiah: The True Story of L. Ron Hubbard* ("the book"). While the court of appeals discussed the "fair use" issue, and rejected the district court's "fair use" analysis, the court below made no findings with respect to which passages were fair use or infringing. Although the court of appeals rejected the district court's overly broad view of what constitutes fair use, even the district court found forty-four separate instances of copyright infringement (A.186-87).[1] As can be ascertained from the district court's appendices,[2] forty-one of these passages were from

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1 Citations to "A. _____" refer to the Appendix to the Petition for a Writ of Certiorari filed by Holt. Citations to "J.A. _____" refer to the Joint Appendix filed in the United States Court of Appeals for the Second Circuit.

2 The district court attached two appendices to its Opinion and Order in which it annotated its findings as to each allegedly infringing passage (J.A. 91-193). The first appendix consists of New Era's list of instances of copying by Holt, numbered 1 to 201, set down side by side with the source material copied. The court annotated each passage as non-infringing under several different rationales or as infringing, using a letter code set forth at the front of the appendix. The second appendix consists of two tables of findings. The first sets forth the court's finding of fair use or infringement for each passage. The second table tallies the court's findings as to each of the twelve different fair use categories created by the district court.

unpublished works and totaled over 1100 words.[3] Determination of which additional passages are infringing must await a trial on damages, which has not yet been held.

A review of the facts and the procedural posture of this case demonstrate that this case simply does not present the issues raised by Holt.

1. New Era is the exclusive licensee of the estate of L. Ron Hubbard's copyrights covering Mr. Hubbard's unpublished works and published nonfiction works (A.2-3, A.52-53). Mr. Hubbard, who died in 1986, was the founder of the Scientology religion and the author of numerous bestselling fiction and nonfiction works (A.2-3, A.52; J.A.734-36). He also authored numerous private, unpublished works, including letters, diaries, stories and personal memoranda.

At the outset, Holt's mischaracterization of the extent and nature of the copying at issue here must be made clear.[4] What Holt repeatedly describes throughout its Petition as "very brief" quotations (Pet. at 10; *see also ibid.* at 7, 11, 19, 29, 39, 57), in fact involved 132 instances of copying from unpublished works, and an additional 69 instances of copying from published works (A.68). Indeed, the district court found that "[t]here is *no dispute* that the biography quotes *extensively* from Hubbard's writings" (A.57) (emphasis added), and the Second Circuit took note of the "extensive reproduction of Hubbard's published and unpublished writings in the biography" (A.3). Holt itself admits that the book copies over 5,000 words from Mr. Hubbard, over 3,100 of which were taken from Mr. Hubbard's unpublished works (J.A.1078-80, Affidavit of M.L. Gready, ¶ 2, at 2-4).[5] In particular, as the court of appeals noted, the book "include[s] extensive quotations from Hub-

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3 In the court below New Era stated that these 41 unpublished passages contained over 900 words; a corrected count shows that these passages contain 1154 words (J.A.116-40).

4 The amicus briefs are similarly premised on a gross distortion of both the record and the decision of the court below.

5 *Compare Harper & Row Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539, 548-49 (1985) (copying of 300-400 words constitutes "generous verbatim excerpts of Mr. Ford's unpublished manuscript").

bard's unpublished Asia Diaries of 1927-29," and "[s]eventy-three of the 132 passages from Hubbard's unpublished writings claimed by New Era to be infringing are found in the Asia Diaries" (A.9).[6]

Following are just three examples of Holt's "very brief" quotations from Mr. Hubbard's unpublished boyhood diaries, which Holt asserts "are 'the only valid way precisely to report' a fact in the copyrighted work" (Pet. at 45) (quoting *Consumers Union* v. *General Signal Corp.*, 724 F.2d 1044, 1049 (2d Cir. 1983), *cert. denied*, 469 U.S. 823 (1984)):

> One fine day the Scout executive telephoned my house and told me I was to meet the president that afternoon. I told him I thought it pretty swell of the president to come way out to my house . . .
>
> * * * *
>
> Opening down the main avenue over which our car travelled were hundreds of narrow intriguing streets, teeming with life. Great fish floated here and there and paper banners hung overhead. The stores were stocked with every sort of junk. Dried fish rattled on strings in the wind. Queer looking foods and drygoods were side by side.
>
> * * * *
>
> An especially interesting one is the fort of San Juan de'Apra [sic] in Apra harbour. Its doors have been sealed for years and, as if to hide the structure, vines wind themselves about it. The walls were built with remarkable skill, especially the corners. Most of the prison and turret have been eroded and have falled [sic] into decay, but the powder house and firing steps remain. The walks that once heard the rhythm of the sentry's beat, and the crash of the evening gun are now the running place of lizards. One can-

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6 The Asia Diaries were written by Mr. Hubbard when he was a teenager. They are the primary source of information on Mr. Hubbard's late teen-age years. The book copies verbatim descriptions of every major event and many minor events contained in the Diaries (J.A.800-01). By extensive quotation from these boyhood diaries, the author obviously concurred in their importance.

> not imagine the solitude and depression that surrounds it. All that beauty and grandeur which surrounded it yesterday has faded as the rose which dies and leaves its thorn.

(Nos. 74, 86, 98; J.A.117, 120-21, 125).[7] The book contains numerous similar examples of gratuitious and lengthy quotations. *See, e.g.*, Nos. 70, 77, 87, 94, 98, 105, 132, 149, 166-69. Miller even went so far as to quote verbatim *entire* short story outlines contained in the teen-age diaries (Nos. 135-142). Holt's extensive appropriation of the teen-age *Asia Diaries* as well as extensive quotation from numerous letters puts the lie to Holt's claim that it took only "very brief" quotations absolutely essential to report facts of purported historical interest.

Holt further mischaracterizes its extensive copying as appropriated only from "certain technically unpublished but publicly disseminated . . . documents written by Mr. Hubbard" (Pet. at 8). In both lower courts, Holt extensively briefed and argued the contention that the writings were published or disseminated and therefore entitled to lesser protection under the Copyright Act. The district court explicitly rejected Holt's argument, and found that all the documents that New Era alleged to be unpublished were, in fact, unpublished and undisseminated (A.68 & n.3). While the panel opinion had no need to reach this question, the concurring judge explicitly agreed with the district court (A.29-30 n.4).

Holt could not identify *any* prior dissemination of 15 unpublished passages. The only alleged "dissemination" of an additional 78 unpublished passages (including the Asia Diaries) resulted when documents were stolen from the Church and then ordered into court (along with any copies) and placed under seal by the state courts in *Church of Scientology of California* v.

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7 While the district court found the last two above-quoted passages to be infringing, the court managed to justify No. 74 as fair use under the novel category "Self-Presentation in Early Diaries," a category used to justify eleven instances of copying from the *Asia Diaries*. Obviously, under this category, any quotations from diaries, journals, or letters in which the author discusses himself (a not uncommon occurrence) could be justified as fair use as "Self-Presentation."

Armstrong, No. C 420153 (Los Angeles Superior Court).[8] Thus, the vast majority of the quoted material was obtained from "*purloined*, unpublished and copyrighted material" (A.227) (Miner, J., concurring in denial of rehearing *en banc*) (emphasis added). While Holt would have this Court believe that the quotations were taken largely from documents obtained by the author from the government under the Freedom of Information Act, 5 U.S.C. § 552 (A.8, 11-12), the fact is that only 32 passages were taken from Mr. Hubbard's letters allegedly obtained under FOIA.[9] Finally, while Holt continues to describe the copied works as "disseminated," it does not seek review of the findings below that these documents are unpublished, and hence it is bound by those findings.

2. New Era initiated this action seeking damages and injunctive relief for copyright infringement against Holt on May 4, 1988. The district court initially denied New Era's motion for a temporary restraining order on the ground of laches (A.209-23). Following further discovery, and after New Era agreed to indemnify Holt for its unrecoverable expenses, the court issued a temporary restraining order on May 20, 1988 (A.57). With the consent of the parties, New Era's motion for a preliminary injunction was then consolidated into a proceeding for a permanent injunction, during which time it was agreed the TRO would remain in effect (A.57).

On August 9, 1988, the district court denied New Era's request for a permanent injunction. The court recognized that the book contained "a substantial amount of taking of [copyright] protected expression sufficient to raise a serious problem of copyright infringement if the takings are not protected by

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8 In *Armstrong*, the state court found that the defendant there had converted the documents from the Church (J.A.789). Both the district court and the concurring judge below found it would be improper to treat such documents that were ordered into court and kept under seal as published (A.29-30 n.4; A.68 n.3).

9 All these letters were written prior to FOIA's passage in 1966, so that Mr. Hubbard could have had no expectation of dissemination or publication. The district court found that *all* these passages were unpublished, but that the copying was justified under the fair use doctrine; the Second Circuit made *no* findings on these passages concerning either publication *or* fair use.

fair use" (A.172). The court further found that New Era intended to commission an authorized biography of Mr. Hubbard, "and that the entire archive of Hubbard's writings, including the documents quoted by Miller, will be available for this project" (A.174).

Nevertheless, the district court found that most of the copying of unpublished material (and 66 of 69 instances of copying of published material) were justified as fair use. The court's premise for its broad finding of fair use was that even if unpublished expression is appropriated for the purpose of enlivening a biography, it may nonetheless be deemed fair use if it is "reasonably necessary to the communication and demonstration of significant points being made about the subject" and has no "significant adverse effect on the market for the copyrighted work" (A.85). As a framework for its thesis, the district court invented twelve separate "fair use" categories, nine of which consist of purported character traits attributed by Miller to Mr. Hubbard; the other three involve "self-presentation in early diaries," "the accurate rendition of ideas," and Mr. Hubbard's early writing style (A.106-58).

Ultimately, the district court recognized that it had excused as "fair use" numerous overlapping examples of copying to demonstrate similar points, and "that the fair use interest diminishes with the quotation of sufficient examples to make the point," and that "some of the instances are less effective and important than others as demonstrations of the characteristics in question. These also might well be disallowed as fair uses." (A.188). The court, however, did not specify which of these repetitive quotations were deemed fair use and which were infringing.

Even with its broad and overlapping twelve fair use categories, the district court could not justify forty-one instances of copying from unpublished works (as well as three instances of copying from published works) as fair use, some of which involved "rather lengthy descriptions" (A.187). The court thus held that the book "infringes Hubbard's copyrights in some of his previously unpublished works" (A.188).

Despite the finding of significant unjustified infringement of unpublished works, the court refused to grant an injunction

against Holt's continued exploitation of New Era's copyrighted works, limiting appellant to a damage remedy only (A.205-06). The court based its denial of an injunction on Mr. Hubbard's status as a public figure; its conclusion, based on certain media reviews, that the book is a serious, critical biography; and what the court construed as the public's right to know concerning Mr. Hubbard (A.96-98, 191-92). Indeed, the district court explicitly converted Mr. Hubbard's creative written expression into unprotectable historical facts: "These utterances [Mr. Hubbard's writings] are, however, pertinent historical facts" (A.202), and the public has a right to learn information "inherent in his declarations" (A.203).

3. On August 11, 1988, the court stayed its decision, pending New Era's motion for expedited appeal. On August 30, 1988, the court of appeals granted the motion for an expedited appeal and continued the district court's stay until oral argument. At oral argument, the court continued the stay pending its decision (A.5). Holt filed a cross-appeal from the finding of infringement.

On April 19, 1989, the court of appeals affirmed the denial of the permanent injunction on the ground that New Era had unreasonably delayed in bringing its suit, which had resulted in prejudice to Holt, and that New Era was therefore barred by laches from obtaining a permanent injunction (A.20-21). The court then "relegat[ed] . . . New Era to its damages remedy" (A.22). The fair use issue was irrelevant to the court of appeals' decision, and the court nowhere acknowledged or addressed Holt's cross-appeal, affirming solely on the issue whether New Era was entitled to an injunction.[10]

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10 The Second Circuit caption described Holt only as "Defendant-Appellee," and the court described Holt only as "the defendant in the action and appellee here" (A.1,3). In addition, over New Era's objection, costs were assessed *solely* against New Era, despite F.R.A.P. 39(a), under which costs presumably would have been assessed against both parties had the court actually reached the issues raised in Holt's cross-appeal. Moreover, while Holt purported to appeal from the district court's finding of 44 instances of infringement, its brief did not address a single passage which the district court found to be infringing. The petition filed with this Court likewise does

Although the decision below rested solely on laches, the court, relying on *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539 (1985), and *Salinger* v. *Random House, Inc.*, 811 F.2d 90 (2d Cir.), *cert. denied*, 108 S.Ct. 213 (1987), added that it disagreed "with a great deal of what is said in the [district court] opinion" (A.17). The court then very briefly reviewed the four fair use factors to make its disagreements clear (A.17-19).[11] This discussion was admittedly wholly irrelevant to the court's decision, and was dictum in the purest sense.[12]

The court rejected the district court's reasoning that justified extensive copying purportedly to make a point about the writer's character, in contrast to copying to display an author's writing style or to "enliven" the text (A.18), although it agreed with the district court that the "purpose" factor weighed in Holt's favor, and that the "nature of the work" factor weighed in New Era's favor.[13] The court further agreed with the district

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not attempt to justify as fair use a single instance of copying found to be infringing by the district court.

11 The amici pretend that the court relied solely on the unpublished nature of the copied works. In fact, a review of the panel's three-page fair use analysis shows that it weighed all four factors (A.17-19). Indeed, the concurrence to the denial of rehearing stated that an injunction may have been denied even in the absence of laches if there had been "[a] different finding on the 'amount and substantiality' fair use factor" (A.231).

12 Thus, Judge Miner, the author of the majority opinion, described this discussion as "nondispositive language" (A.225) (Miner, J., concurring in denial of rehearing en banc); *see* A.22 (Oakes, J., concurring) ("unnecessary for the majority opinion to do anything other than affirm the denial of an injunction for laches"; court "take[s] issue with Judge Leval's opinion . . . by way of dictum").

13 Holt substantially misquotes the panel opinion when it asserts that the court stated that it saw no distinction between quotation to enliven text and " 'quotation necessary to report facts accurately.' (A.18.)" Pet. at 45. The court below never made the statement placed in quotations by Holt, and never even implied that Holt's extensive quotations were necessary to report facts accurately. The misquotation is a far cry from what the court actually discussed as an impermissible basis for extensive copying of unpublished

court that the book contains "a substantial amount of taking" of copyrighted works (A.19). The court also found the book would have an effect on the market for New Era's forthcoming authorized biography, particularly given the district court's findings of fact that New Era intended to commission an authorized biography of Mr. Hubbard, and that all his writings, including the Asia Diaries and other materials copied by Holt, would be made available for this purpose (A.19).

Relying on *Harper & Row*, 471 U.S. at 557, the court then rejected the district court's assertion that, under the First Amendment, the public had a "right to know" the author's *expression* of an idea, as distinguished from the *idea* itself, and found that no First Amendment concerns not accommodated by the Copyright Act were implicated in this case (A.20). As the court aptly put it, even if an injunction had issued, "the public would not necessarily be deprived of an 'interesting and valuable historical study,' . . . but only of an infringing one" (A.20).

Judge Oakes concurred in the result, but would have largely adopted the reasoning of the district court with respect both to fair use analysis and the issuance of an injunction. Judge Oakes agreed with the district court's finding that much of the copying was fair use, but that there was a more than negligible amount of infringing quotation (A.45).[14]

4. Holt's petition for rehearing en banc was denied by a 7-5 vote (A.224). On behalf of four judges, Judge Miner, the author of the panel opinion, stated, "I of course concur in the Court's decision to reject the *unprecedented* proposal for in banc hearing suggested by a *prevailing party* dissatisfied with certain *nondispositive language* in the panel majority opinion." (A.225) (Miner, J., concurring in the denial of rehearing *en*

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works: "use of protected expression to communicate 'significant points' about the subject" (A.18).

14 Judge Oakes specifically disagreed with the district court's finding of fair use with respect to an additional eight passages (Nos. 135-42), containing over 350 words, which were quoted merely to show Mr. Hubbard's teen-age fiction writing style in the Asia Diaries (A.39-40).

banc) (emphasis added). The concurrence emphasized that under this Court's decision in *Harper & Row*, the substantial amount of copying of "purloined, unpublished and copyrighted material" could not be justified as fair use (A.227).

The concurrence also questioned whether judges, rather than literary critics, should engage in drawing distinctions between copying of expressive material to enliven text and copying to demonstrate "truth," as the *en banc* dissent suggested, and noted that nothing in the panel opinion barred the use of small amounts of unpublished expression either to enliven the text or to report facts accurately (A.230-31). That issue was irrelevant here, however, because Holt had copied "extensive" amounts of New Era's copyrighted works (A.3, A.57), not "small amounts." The concurrence also made clear that an "injunction is not the automatic consequence of infringement and that equitable considerations always are germane to the determination of whether an injunction is appropriate," (A.234) and modified the panel opinion as follows:

> Since [under ordinary circumstances] the copying of "more than minimal amounts" of unpublished expressive material calls for an injunction barring the unauthorized use, the consequence of the district court's findings seem obvious.

(A.235) (bracketed material added) (citation omitted).[15]

As the dissenting opinion from the denial of rehearing, joined by four judges, made clear, "[t]he *holding* of the panel opinion is only that in the circumstances of this case, the doctrine of laches bars the issuance of a preliminary [sic] injunction." (A.236-37) (emphasis original). The dissent then agreed with the concurrence that copying of small amounts of unpublished expression could be fair use under certain circumstances (A.240). The dissent, however, never indicated that it believed only "small amounts" were copied here; in fact, it noted that the panel opinion may have found the distinction between copying to enliven and to make points about character "unwar-

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15 Although the court of appeals sent a corrected slip opinion to the parties, the panel opinion submitted by Holt to this Court does not reflect this change in the decision. *See* A.19 (sixth line from bottom).

ranted in light of the amount of protected expression that was copied" in this case (A.242). The dissent also did "not believe that biographers and journalists need be apprehensive that this Circuit has ruled against their right to report facts contained in unpublished writings, even if some *brief quotation* of expressive content is necessary to report those facts accurately" (A.242-43) (emphasis added). Finally, the dissent agreed with the concurrence that equitable considerations are always relevant to the issuance of an injunction (A.245).[16]

A trial on the issue of damages is now pending, at which time the extent of Holt's infringement may be determined. Prior to a trial on damages, there is simply no way for this Court to know which passages will be justified as fair use and which will be found to be infringing by the lower courts and on what basis.

REASONS WHY THE PETITION SHOULD BE DENIED

Holt's petition raises nothing more than hypothetical questions wholly inappropriate for review by this Court: How would the Second Circuit construe the copyright laws *if* it were presented with a book that did *not* quote *extensively* from copyrighted unpublished works, *if* the quotations were *in fact* essential to convey facts and ideas, and *if no* equitable factors existed that would militate against an injunction? This case raises none

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16 Prior to the en banc opinions, the district court *sua sponte* raised the issue whether New Era would be entitled to an injunction if it compensated Holt for the prejudice allegedly suffered as a result of New Era's laches. At the district court's request, New Era filed a memorandum arguing that the court *could* issue an injunction if Holt's prejudice were cured, but it found no case discussing this issue, and New Era explicitly reserved the right not to tender compensation even if the court concluded New Era is entitled to a permanent injunction. Memorandum of Law in Support of the Entry of a Permanent Injunction, at 2 & n.3. New Era has not moved for an injunction on this basis, Holt's misrepresentations to this Court notwithstanding, Pet. at 60 n.13, and has made clear to the district court that it does not seek an injunction.

New Era strongly objects to the statements made in the Petition, at 60 n.13, which appear nowhere in the record and are grossly inaccurate. Holt has distorted a brief comment made in the course of confidential settlement discussions, which it is improper for Holt to divulge at all, let alone mischaracterize. *See* Fed.R.Evid. 408.

of these issues, and Holt really is seeking an advisory opinion on behalf of publishers in general, since nothing this Court says in response to the issues raised by Holt will change the fact that Holt *prevailed* on the issue of New Era's right to an injunction, or will cure the fact of substantial infringement found by the district court as well as the court of appeals.

I. THE PETITIONER PREVAILED ON THE ONLY ISSUE UPON WHICH THE COURT OF APPEALS RULED

Petitioner Holt *prevailed* on the only issue resolved by the court below: whether New Era was entitled to a permanent injunction. Nothing in the court's opinion directly resolved the fair use issues raised by Holt, or even acknowledged Holt's cross-appeal. Instead, the court "relegat[ed] . . . New Era to its damages remedy" (A.22). At a trial on damages, the district court may apply the fair use analysis set forth in *Harper & Row* and reaffirmed below to the allegedly infringing passages, and those determinations may be subject to appellate review.

Until that time, this Court has only the abstract dictum of the court below, with no indication of how that dictum will be applied in the concrete factual circumstances of this case. Thus, for example, this Court has no way of knowing whether the lower courts will find the quotations from the letters Mr. Hubbard wrote to various government agencies—and of which Holt so vociferously complains—to be infringing and if so, to what extent. The district court found such copying to be fair use; the court of appeals made no findings whatsoever on these passages, although it made clear that some copying of unpublished material could be fair use (A.231, 240). On the other hand, under any possible definition of fair use for unpublished works, there can be no justification for the extensive copying of substantial portions of the Asia Diaries and other unpublished confidential materials, as even the district court acknowledged.

Consideration of the fair use issue here is not jurisdictionally barred in the constitutional sense;[17] "[t]he literal language of

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17 On the other hand, the injunction issue *is* jurisdictional, because there is no case or controversy within the meaning of Article III to the United States Constitution. *See* Point II, *infra*.

the [28 U.S.C.] § 1254(1) reference to any party is broad enough to encompass the winning party before the court of appeals. But . . . there appears to be no recorded instance where the Court has considered the problem or has granted a petition filed by a party who prevailed on the merits below." R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 46 (6th ed. 1986).[18] Rather, the issue implicates this Court's prudential practice of "refus[ing] to entertain an appeal by a party successful in obtaining a final judgment in his favor in the lower court." *Id.* (citing cases). *Cf.* A.224 (Miner, J., concurring in denial of petition for rehearing) (noting the "unprecedented proposal for in banc hearing suggested by a prevailing party dissatisfied with certain nondispositive language").

Here the *only* judgment is in favor of the petitioning party; there still must be a damages trial on the fair use issues, at which time the lower courts will have full opportunity to analyze the allegedly infringing passages under the relevant decisions and to create a record for appellate review. Intervention by this Court now would be premature and would result in little more than an advisory opinion on abstract questions that have little to do with this case and which have yet to be applied in a concrete instance. Indeed, if the petitioner is correct that the decision below is having an adverse impact on the publishing industry, surely this Court can expect that there will be ample opportunity in appropriate cases for clarification (if such be needed) of the position of the court below, and there will be ample opportunity for this Court to address in a concrete factual context the issues only hypothetically raised by the petitioner here.

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18 In *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977), this Court granted certiorari to both TWA and the Union, both defendants-appellees below. TWA had lost in the court of appeals, but the Union had technically prevailed since the plaintiff had not directly challenged the district court's decision in the Union's favor and the court of appeals did not address the merits as to the Union. *Id.* at 70 & n.5. The Court noted the anomaly in granting *certiorari* to a prevailing party, but found that, given that the Court resolved the case in TWA's favor, it did not need to discuss further the Union's status before the Court. *Id.* at 70 n.5.

II. HOLT CANNOT RAISE THE ISSUE OF THE PROPRIETY OF AN INJUNCTION HERE, SINCE NO INJUNCTION ISSUED

As Holt recognizes at the outset of Point IV of its Petition, at 59, New Era was *denied* a permanent injunction in this case. Nevertheless, Holt asserts that it is entitled to an advisory opinion from this Court as to the correctness of the Second Circuit's general standard for the issuance of an injunction in copyright infringement actions.

In an effort to manufacture a case or controversy on the proper injunction standard, Holt first argues that a temporary restraining order and a stay pending appeal had been in effect prior to the Second Circuit's decision in April 1989. Holt, however, lacks standing to complain of these orders which have been dissolved for almost nine months. After a TRO entered on May 20, 1988, Holt *consented* to its maintenance throughout the pendency of the permanent injunction motion (A.57; J.A.421). Holt never sought its dissolution in the district court, the court of appeals, or this Court pending the district court's determination almost three months later. Likewise, Holt never sought relief from the Second Circuit's stay pending appeal during the almost seven months the case was under advisement either in that court or in this Court. Having failed to exhaust its challenges to these long-dissolved stays, Holt has no basis to complain to this Court now that the stays were improper.

The normal prohibitions against interlocutory appeals are waived for preliminary injunctions and stays pending appeal, precisely to permit an allegedly aggrieved party to protect his rights, and to avoid such belated complaints of long-dissolved injunctions. *See* 28 U.S.C. § 1292(a) (court of appeals has jurisdiction of interlocutory orders granting injunctions); *Sampson* v. *Murray*, 415 U.S. 61, 86-87 (1974) (temporary restraining order treated like preliminary injunction for purposes of appellate review when continued beyond the time permissible under Fed.R.Civ.P. 65); *Metropolitan County Board of Educ.* v. *Kelley*, 453 U.S. 1306 (1981) (per Stevens, J.) (jurisdiction exists to vacate stay issued by court of appeals pending appeal). Thus,

no case or controversy is created by a stay lifted almost nine months ago that Holt never even bothered to challenge.

Holt also attempts to manufacture a case or controversy by alleging that New Era has argued that an injunction may issue if New Era cured the prejudice to Holt caused by New Era's purported laches. Yet, as Holt well knows, New Era has expressly disavowed to the district court its intent to seek such relief, and the arguments made were solely in response to a *sua sponte* request by the district court for briefing on this issue. Certainly, the mere fact that an abstract question was at one time raised by the district court, without resolution, does not create a case or controversy in *this* Court.[19]

This case highlights the propriety of the "case or controversy" requirement of Art. III of the Constitution. New Era was denied an injunction because of laches. It no longer has any interest in whether it could *also* be denied an injunction for other reasons, or whether the proper injunction standard is precisely as formulated by any of the decisions below. New Era's lack of interest in the issue or its outcome removes the concrete adverseness required to present the requisite "case or controversy." *See Babbitt* v. *United Farm Workers National Union*, 442 U.S. 289, 298 (1979) (Article III requires that the "conflicting contentions of the parties . . . present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract").[20]

In any event, Holt's position that "injunctive relief [should] be discretionary, not mandatory, in cases of infringement," pursuant to 17 U.S.C. § 502, Pet. at 62, is not inconsistent with the Second Circuit's position. The four judges concurring in the denial of the petition for rehearing *en banc* also explicitly noted "the discretionary nature of an injunction," and stated, "*[a]ll*

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19 Holt argues that the injunction issue is "*certain*" to recur again and again. Pet. at 60. Assuming this is so, prudence would seem to dictate that this Court await another case that actually presents the issue.

20 Holt makes reference to a pending copyright case, *New Era Publications International, ApS* v. *Carol Publishing Group*, No. 89 Civ. 3845 (S.D.N.Y.). This case, however, in which no substantive decision has been issued, does not involve unpublished materials, and so does not even raise the abstract issues that Holt presents here.

now agree that injunction is not the automatic consequence of infringement and that equitable considerations always are germane to the determination of whether an injunction is appropriate." (A.234) (emphasis added). The concurrence also quoted the relevant language in 17 U.S.C. § 502(a). Finally, the four dissenting judges agreed: "The panel's holding demonstrates that its language is not to be understood as narrowing the equitable discretion as to the propriety of an injunction, which is conferred by statute," again citing Section 502(a) (A.245). Where the petitioning party and the court below hold similar views, and where the losing party does not seek review and lacks an interest in the outcome of the theoretical debate, there is no basis for this Court to grant review, both as a prudential matter and under the limitations of Article III.

III. THIS IS AN UNEXCEPTIONAL CASE OF COPYRIGHT INFRINGEMENT THROUGH EXTENSIVE QUOTATION OF UNPUBLISHED WORKS

Even assuming this Court felt that the fair use issues were properly presented for this Court's review, this is an unexceptional case of copyright infringement which the Second Circuit resolved under the principles previously set out in *Harper & Row*, *supra*, 471 U.S. 539, and other decisions of this Court. Only through gross distortion of the record can petitioner argue that this unremarkable case warrants this Court's scrutiny.

A. The Court Below Recognized That Brief Quotations From Unpublished Copyrighted Works May Be Fair Use, But That This Case Involved Extensive Quotations

Petitioner has grossly misrepresented the facts of this case to suggest it involves only "brief" quotations from unpublished works. It then inaccurately suggests that the court of appeals indicated (albeit in dictum) that even brief quotations from unpublished works cannot be fair use. In fact, the court of appeals recognized that brief quotations may be fair use, but correctly considered that principle inapplicable to this case, which involves extensive quotations from unpublished works.

This Court in *Harper & Row*, 471 U.S. at 563, made clear that "brief" quotations from unpublished copyrighted works may be permitted under the fair use doctrine. Contrary to petitioner's misrepresentation, the court below accepted this to be a settled principle of law. The panel opinion did not address whether brief quotations of unpublished works could be fair use, since that is not an issue in this case. The concurrence to the denial of rehearing *en banc*, however, explicitly embraced the principle that brief quotations may be used:

> It is heartening to note that the dissenters "are confident that [the panel majority] has not committed the Circuit to the proposition that the copying of some small amounts of unpublished expression to report facts accurately and fairly can never be fair use." This confidence is not misplaced, of course, because there is nothing in the panel majority that suggests otherwise!

(A.230-31) (material in brackets in original). Thus, a clear majority of the judges of the Circuit—the four judges joining in the concurrence in the denial of rehearing as well as the four judges joining in the dissent—explicitly recognized that brief quotations of unpublished works may be fair use.[21]

The concurrence to the denial of rehearing also reiterates the view of the panel majority regarding fair use—namely, that the quotations here were simply too extensive to be excused as fair use. Immediately after acknowledging that brief quotations may be permitted, the concurrence noted that:

> A different finding on the "amount and substantiality" fair use factor in the case at bar well might have dictated the same outcome in the case [denial of an injunction] were laches not available as a defense.

(A.231) (material in brackets added).

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21 The language of the concurrence to the denial of rehearing is instructive regarding the panel majority dictum, as it is written by the author of the panel opinion, concurred in by the other member of the panel majority, and explicitly purports to clarify the meaning of the panel opinion on this point.

The extent of the copying, not any novel theory of law, dictated the panel's views as to fair use. The panel found that the book included "extensive quotations from Hubbard's unpublished Asia Diaries of 1927-1929," and noted that 73 passages from that work were quoted, as well as 59 passages from other unpublished works (A.9). The panel's finding of extensive quotation are fully consistent with those of the district court, which noted "[t]here is no dispute that the biography quotes *extensively* from Hubbard's writings." (A.68) (emphasis added).[22]

Petitioner can point to no case, certainly none decided after the Court's decision in *Harper & Row*, in which quotation of 3,100 unpublished words or anywhere near that number has been justified under the fair use doctrine.[23] This amount of taking is far in excess of the "generous" quoting of 300 to 400 words copied by the *Nation* magazine from the memoirs of President Ford, which this Court found infringing. *Harper & Row*, 471 U.S. at 548, 569. The simple fact is that the extensive, gratuitous copying of unpublished material in this case made it relatively easy to determine that the use was not fair.

Finally, it is important to place the alarmist tone of the Petition and the *amici* in perspective.[24] Historians and biographers remain free to utilize and report any fact or idea they discover

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22 It is these dispositive findings of the district court and the court of appeals which illustrate the distortion of record by Holt in contending that the copying involved only "very brief" quotations.

23 The weakness of petitioner's case is highlighted by its sole reliance for this point upon *Estate of Hemingway v. Random House, Inc.*, 53 Misc.2d 462, 279 N.Y.S.2d 51 (Sup. Ct. N.Y. Co.) *aff'd*, 29 A.D.2d 633, 285 N.Y.S.2d 568 (1st Dept. 1967), *aff'd*, 23 N.Y.2d 341, 296 N.Y.S.2d 771 (1968), a pre-*Harper & Row* case, Pet. at 36-37, which involved no verbatim copying of unpublished letters. The case primarily turned on the court's analysis that the writer's *oral* conversations with Hemingway were not copyrightable by Hemingway.

24 This Court should ignore the bald, unsubstantiated allegations of amicus Pen American Center, at 19-20, that certain other books could not have been written "in the same way" under the decision below. The brief does not put forth a shred of evidence to support its self-serving claim, and this tactic reflects the hyperbole and distortion endemic to the Petition and the amicus briefs.

in unpublished, copyrighted works.[25] The court below, consistent with this Court, has merely stated that *quotation*, not use, of such materials must be brief. Because there is no copyright for any ideas or facts found in such materials, *Harper & Row*, 471 U.S. at 556; A.20, there is no dramatic censorship of critical views entailed in the opinion of the court below. There is simply nothing novel in the court of appeals' abstract fair use analysis that could warrant this Court's review.

B. Petitioner's Claim For Expanded Fair Use Was Soundly Rejected By This Court In *Harper & Row*

Petitioner contends that the court of appeals was wrong not to recognize a greater right "for scholars" to appropriate extensive amounts of copyrighted expression where the asserted purpose is to convey facts "accurately." Pet. at 42-47. This argument for such special treatment, however, falsely suggests that Miller's quoting was necessary to convey facts and, in any event, was soundly rejected by this Court in *Harper & Row*.

Holt cannot realistically contend that the extended quotations taken here were truly necessary to report facts accurately. Neither the district court nor the panel opinion found this to be the reason for the extensive quotations. The district court found many of the quotations to be "reasonably necessary to the communication and demonstration of significant points being made about the subject" (A.85), not as "necessary to report facts accurately." The court of appeals rejected the district court's justification, but never addressed the issue of reporting "facts accurately," because such a rationale has nothing to do with

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25 Holt quotes historian Barbara Tuchman, Pet. at 32, to suggest that the decision below interferes with historical research. To the contrary, nothing in the decision below interferes with the process of historical research which Ms. Tuchman described. Were she alive today, she could "plunge . . . into the primary sources . . ." and pursue facts and ideas contained in unpublished works as vigorously as ever. She would merely be constrained to communicate those facts and ideas primarily in her own words, rather than in the copyright owners' words if the works were unpublished, copyrighted, *and* she lacked permission from the copyright holder.

this case.[26] The question of copying to report facts accurately was injected into this case for the first time in the abstract discussion in the en banc opinions, perhaps reflecting the fact that New Era had no opportunity to respond to the petition for rehearing en banc and thus focus the court on the actual issues raised by *this* case. It is simply impossible to justify the extensive quotations from the *Asia Diaries*, including, for example, descriptions of a Chinese marketplace and an old fort, *see supra*, at 3-4, as brief takings necessary to convey facts. Holt, like the *Nation* magazine, "did not stop at isolated phrases" but instead made use of copyrighted expression that far "exceeds that necessary to disseminate the facts." *Harper & Row*, 471 U.S. at 563-64.

Even assuming the issue exists in this case, the court below properly rejected Holt's appeal for the right to quote extensively to report facts accurately. Clarifying the sound reasons for rejecting Holt's distinction, the panel author stated in his concurrence to the denial of rehearing en banc:

> . . . I question whether judges, rather than literary critics, should decide whether literary material is used to enliven a text or demonstrate truth. It is far too easy for one author to use another's work on the pretext that it is copied for the latter purpose rather than the former.

(A.230).[27]

The rejection of a special dispensation for extensive quoting to "convey facts" by the panel below is entirely consistent with this Court's analysis in *Harper & Row*, which discussed and rejected a similar argument. In *Harper & Row*, the defendant-

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26 As noted, *supra*, n.13, the panel opinion never used the phrase "quotation necessary to report facts accurately," which petitioner mistakenly attributes to it. Pet. at 45.

27 The following example illustrates the problems that arise when judges turn literary critics. The district court characterized Passage No. 71 as "F10—Self-Presentation in Early Diaries." J.A.116. In fact, the author explicitly claimed to have quoted the passage to show Hubbard's "style of writing," J.A.536, which is F12 of the court's categories. It is difficult to understand how the passage is "reasonably necessary" to show Mr. Hubbard's "Self-Presentation" when that was not the author's intent at all.

respondent argued that fair use should be broader where the information it sought to convey related to matters of the highest public concern. It argued that copying President Ford's expression was "essential to reporting the news . . ." because " 'the precise manner in which [he] expressed himself [was] as newsworthy as what he had to say.' " 471 U.S. at 556 (bracketed material in original).

This Court characterized this theory as an argument that there should be a "public figure" exception widening fair use, and then rejected it. *Id.* at 557-60. The Court held that neither an individual's public figure status nor the fact that the manner of his expression is newsworthy can justify alteration of the balance struck between protection of copyright and the dissemination of information:

> Repondent's theory, however, would expand fair use to effectively destroy any expectation of copyright protection in the work of a public figure. . . . The fact that the words the author has chosen to clothe his narrative may of themselves be "newsworthy" is not an independent justification for unauthorized copying of the author's expression prior to publication.

Id. at 557. The Court further stated:

> ["]The fair use doctrine is not a license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance." *Iowa State University Research Foundation, Inc.* v. *American Broadcasting Cos., Inc.*, 621 F.2d 57, 61 ([2d Cir.] 1980).

Harper & Row, 471 U.S. at 558 (citing also *Roy Export Co. Establishment* v. *Columbia Broadcasting System, Inc.*, 503 F. Supp. 1137 (S.D.N.Y. 1980) ("newsworthiness" of material does not justify copying), *aff'd*, 672 F.2d 1095 (2d Cir.), *cert. denied*, 459 U.S. 826 (1982)).

Holt's claim to a broad right to quote copyrighted material is premised on its view that Mr. Hubbard was "one of the most . . . controversial *public figures* on the American scene." Pet. at 8-9 (emphasis added). Holt's plea for a right to quote in

order "to prove the fact that Hubbard used particular words and expressed particular views that were at odds with his public persona," Pet. at 43, is simply a reiteration of the argument for a public figure exception that was rejected by the Court in *Harper & Row*. While Holt has strained to put its argument in other words in order to avoid the clear holding of *Harper & Row*, that case firmly established that Holt has no special license to quote either because Mr. Hubbard's expression constitutes "pertinent historical facts," A.202, or because "the precise manner in which [he] expressed himself [was] as newsworthy as what he had to say." *Harper & Row*, 471 U.S. at 556.

Brief quotations from unpublished works necessary to convey facts accurately may be fair use. *Id.* at 563. But there are clear limits on permissible quoting necessary for accuracy; while it may be permissible to quote "isolated phrases," the quoting of "subjective descriptions and portraits" is not considered "necessary" to convey facts under this Court's analysis. *Id.* This Court has illustrated the limited type of "isolated phrases" which may be considered necessary to convey facts: "Mr. Ford's characterization of the White House tapes as the 'smoking gun' is perhaps so integral to the idea expressed as to be inseparable from it." *Id.*

The decision below is fully consistent with the parameters set out by this Court regarding permissible quoting "necessary" to convey facts, Holt's misrepresentation notwithstanding. Pet. at 45. The panel author stressed in the concurrence to the denial of rehearing that *brief* quotations may be justified, whether used to enhance accuracy[28] or to enliven the text (A.231). The four dissenting judges agreed (A.243). Nothing in the panel opinion

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28 It has been understood that the language of *Consumers Union* v. *General Signal Corp.*, 724 F.2d 1044, 1049 (2d Cir. 1983), *cert. denied*, 469 U.S. 823 (1984), relied upon by Holt, Pet. at 45, suggesting a general right to quote for accuracy, was implicitly rejected by this Court in *Harper & Row*. *See Consumers Union* v. *The New Regina Corp.*, 664 F.Supp. 753, 757 & n.5 (S.D.N.Y. 1987), where, on remand in the *Consumers Union* case, the district court noted that the *Consumers Union* language regarding quoting for accuracy was premised on the court of appeal's decision in *Harper & Row*, which was reversed by this Court. *See also* A.231-33. *Salinger*, 811 F.2d at 96 ("the biographer has no inherent right to copy the 'accuracy' . . . of the [author's] expression.")

suggests that the panel would have been unwilling to find fair use for brief quotes necessary for accuracy. Indeed, the judges dissenting to the denial of rehearing assumed "in light of the amount of protected expression copied" that the panel found Holt had not stopped at isolated phrases (A.242). This Court should not be misled into believing that an extreme position was adopted below which needs review here.

C. The Court of Appeals' Analysis Of The Market Factor Is Consistent With The Copyright Statute And Decisions Of This Court

As part of fair use analysis, Congress has required inquiry into "the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107(4). "[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright," and where "the intended use is for commercial gain, [the] likelihood [of future harm] may be presumed." *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).[29] Petitioner's use of the copyrighted material was, of course, for commercial gain. Under *Sony Corp.*, the holding of the court below that there was potential market impairment was more than adequately supported.

Contrary to petitioners' implication, Pet. at 57, the court below relied on the factual findings of the district court. The district court "credit[ed] plaintiff's assertion that it will commission an authorized biography of Hubbard and that the entire archive of Hubbard's writings, including the documents quoted by Miller, will be available for this project." (A.174). Explicitly relying on these findings of fact, the court below held that petitioner's copying would have some effect on the market for the forthcoming biography, and very reasonably questioned how the district court could come to the opposite conclusion, given its own findings of fact:

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29 Even where the use is noncommercial, it is not "necessary to show with certainty that future harm will result. What is necessary is that *some* meaningful likelihood of future harm exists." *Sony Corp.*, *supra*, 464 U.S. at 451 (emphasis original).

> Since the district court accepted New Era's contention that it would commission an authorized biography of Hubbard and that all Hubbard's writings, published and unpublished, would be made available for that purpose, it is difficult to conclude, as does the district court, that the book published by Holt would have no effect on the market for New Era's forthcoming book.

A.19.

Petitioner's baseless charge that the court below engaged only in "speculation that New Era might use some of the same words quoted by Mr. Miller," Pet. at 57, ignores both the presumption which should be applied in respondent's favor, *Sony Corp.*, *supra*, 464 U.S. at 571, and the facts. The district court itself understood that respondent intended to use much of the same material that petitioner copied (A.124).[30] It cannot realistically be questioned that respondent intends to use the Asia Diaries and letters quoted by Miller in its planned biography. These Diaries are, of course, a very rich resource regarding Mr. Hubbard. Indeed, Holt tacitly acknowledged the high value of the Diaries by its wholesale copying from them. Petitioner's work took and copied the core of the Diaries (J.A. 800-01), or, in this Court's words, "the heart of the book." *See Harper & Row*, 471 U.S. at 564-65. It can hardly be doubted that Holt's extensive quotations from the Diaries would have at least some likely effect on the market for the Diaries or a biography containing portions of them. Holt's argument to the contrary does not merit this Court's review.[31]

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30 The panel concurrence below suggests that some of the material quoted by Miller is unlikely to be used in New Era's biography because it is allegedly not flattering to Mr. Hubbard (A.44). However, much of the material taken is favorable to Mr. Hubbard and might well be used in the biography. Indeed, the district court found that the material quoted "appears unflattering to Hubbard only because of Miller's 'bias and slant', Long Aff. ¶ 28 and that 'there are two sides to every coin' " (A.124).

31 Petitioner's comparison of the evidence of market impairment here to that in *Harper & Row*, Pet. at 58 n.12, is misplaced. As this Court noted, "[r]arely will a case of copyright infringement present such clear-cut evidence of actual damage" as did the *Harper & Row* case. *Harper & Row*, 471 U.S. at 567.

IV. HOLT'S PERIPHERAL ARGUMENTS DO NOT MERIT THIS COURT'S REVIEW

Holt continues to present several baseless or irrelevant arguments that have been properly ignored or rejected by the courts below.

A. Petitioner's Contention That The Unpublished Works In This Case Are "Disseminated" Or "Technically" Unpublished Was Rejected By The Courts Below

Petitioner attempts to escape this Court's limitations on the amount of copying from unpublished works that may be justified as fair use by characterizing the works in issue here as "disseminated" or only "technically" unpublished. *See* Pet. at 7-8, 10-11, 42, 48-51. The assertion is a gross distortion of the truth, and masks the fact that Holt litigated and lost this issue in *both* the district court and court of appeals. Holt has not sought review of the determination below, yet persists in proposing to this Court that the documents are only "technically" unpublished or "disseminated."

Below, Holt contended that numerous documents, including the Asia Diaries, lost their status as unpublished when, after they had been converted from the Church of Scientology of California and the Church filed suit to recover them, the convertor was ordered to deposit them into state court. Holt neglected to state below, as it neglects to do here, that the documents were placed and maintained under seal in the court file, by court order.

The district court expressly held that the documents ordered into the California court under seal were unpublished. It reasoned that "[i]f the bringing of a lawsuit to enforce a right necessarily resulted in its sacrifice, the right would be chimerical. *Cf. Marvin Worth Productions* v. *Superior Films Corp*, 319 F. Supp. 1269, 1271 (S.D.N.Y. 1970)" (A.68 n.3). The panel majority implicitly accepted the holding that the documents placed in the court record were unpublished, and Judge Oakes in his concurrence explicitly accepted it, noting: "for all practical purposes the documents in the California case were at almost all times under seal, subject to court order, not copied

and ultimately returned to the Church after the settlement of Armstrong's cross-claim against the Church." (A.29-30 n.4). Following the issuance of the panel opinions, Holt failed to move for reargument of the determination that the documents placed in the California court file under seal were unpublished. Nor has it asked this Court to review the question whether these documents are unpublished or "disseminated," instead assuming a position directly contrary to the decisions below. Thus, petitioner has failed to preserve this issue.

Holt has also implied that most of the passages it claims are disseminated are from letters to government officials or agencies. *See* Pet. at 11. As previously shown, these letters account for only 32 of 132 instances of copying from unpublished works. Since the letters to government officials and agencies account for a small minority of the copied passages, and because the court below never discussed these letters at all, there is no need for this Court to review the status of these documents as "disseminated" *vel non* at this time.[32]

Given that the central argument regarding "dissemination" relates to the placement of the documents into the California court record, and the settled state of the law holding that these documents are not disseminated,[33] there is no need for Supreme

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32 Respondent submits that the issue of whether these letters were unpublished was correctly decided by the district court (A.68). *See, e.g.*, 1 M. Nimmer, *Nimmer on Copyright*, § 4.10, at 4-49 & n.4 (1989); *WPOW, Inc.* v. *MRW Enterprises*, 584 F.Supp. 132, 136 (D.D.C. 1984).

33 In addition to the opinion of the district court (A.68 n.3) and the concurring opinion of the panel (A.29-30, n.4), *see also Marvin Worth Productions* v. *Superior Films Corp.*, 319 F.Supp. 1269, 1271 (S.D.N.Y. 1970); *Douglas International Corp.* v. *Baker*, 335 F.Supp. 282, 285 (S.D.N.Y. 1971); *Testa* v. *Janssen*, 492 F.Supp. 198, 202 (W.D. Pa. 1980), *citing Bartok* v. *Boosey & Hawkes, Inc.*, 523 F.2d 941, 945 (2d Cir. 1975).

Petitioner relied without success in the courts below on the one case it relies on herein, *McClesky v. Zant*, No. 1:81-CV-2434 (N.D. Ga. 1988). Pet. at 48. *McClesky* is entirely inapposite, since there a copyright owner voluntarily placed the copyrighted work, a social science database, into an open court record for the express purpose that it be used for the resolution of a legal question in a pending case—*i.e.*, whether the death penalty was imposed in a racially discriminatory manner. Here, the copyrighted materials were ordered placed in court under seal by the individual who the California court determined had converted them.

Court review of this issue. The full extent of the protection accorded unpublished copyrighted works by this Court in *Harper & Row* applies in this case.

B. The Issue of "Creative Control," If Relevant, Favors New Era

Both the district court and the court of appeals properly ignored Holt's arguments concerning "creative control" of Mr. Hubbard's unpublished works. This irrelevant argument deserves no more attention from this Court. In *Harper & Row*, this Court discussed the right to prepublication creative control in the context of rejecting the *Nation*'s argument "that the unpublished nature of copyrighted material is *only relevant to letters* or other confidential writings not intended for dissemination," not manuscripts that would soon be published. 471 U.S. at 554 (emphasis added). The issue of prepublication creative control merely provided a reason to bring soon-to-be-published works within the same protection traditionally accorded unpublished letters and other personal papers. Holt would now stand this Court's position on its head in arguing that where the author cannot exercise prepublication creative control (because he is deceased), there is no (or diminished) copyright protection for "letters and other confidential writings." In any event, the issue of the author's creative control, which merely helped to bring President Ford's memoirs within the well-established protection for letters and other confidential writings, was hardly dispositive of the result in *Harper & Row*.

Moreover, the argument that no interest remains in "creative control" of the unpublished works because Mr. Hubbard is dead ignores the fact that the purpose of the copyright law is to protect copyright *holders*, not only authors. *See* 17 U.S.C. § 501; *Dodd, Mead & Co., Inc.* v. *Lilienthal*, 514 F.Supp. 105 (S.D.N.Y. 1981). Thus, while Mr. Hubbard obviously cannot exercise "creative control" today over his unpublished works, New Era, as the exclusive copyright licensee, retains as great an interest in the right of first publication and other rights as does the original author. Thus, the copyright holder retains the

exclusive right to exercise creative control in which unpublished works to publish, in what manner, and when.

C. New Era Retains the Important Right Not to Speak

In *Harper & Row*, 471 U.S. at 559, this Court recognized that copyright holders retained a "right not to speak," which was a corollary of the right of first publication. Holt's claim that the copyright holder, as opposed to the author, has no such right is without any basis in law. In *Harper & Row*, this Court spoke of the right not to speak in terms of "the copyright owner's monopoly," and that "copyright . . . serve[s] this countervailing First Amendment value." *Id.* at 559-60.[34] As the copyright holder, New Era may determine not only which of Mr. Hubbard's works to publish, but whether to publish at all. The Copyright Act clearly does not contemplate that the rights conferred by the Act are vanquished by the author's death. *See* 17 U.S.C. §§ 302(a), 303; *Salinger*, *supra*, 811 F.2d at 100.

Holt would totally destroy this right not to speak by the sophistic argument that Mr. Hubbard's written utterances are "pertinent historical facts," Pet. at 54, that he or his heirs have no right or power to keep from the public. Yet there is no difference between Mr. Hubbard's unpublished writings and those of President Ford's. Certainly, what President Ford had written (in prepublication form) about his role in the pardon of President Nixon conveyed more "pertinent historical facts" than what Mr. Hubbard had to say as a teenage traveler in Asia sixty years ago. Yet this Court recognized that "[i]t is fundamentally at odds with the scheme of copyright to accord lesser rights in those works that are of greatest importance to the public." 471 U.S. at 559. Just as President Ford retained the "right not to speak" after writing, but before publishing, his memoirs, so

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34 In *Harper & Row*, this Court noted that the copyright monopoly could not be used to suppress facts. 471 U.S. at 559. Despite Holt's protestations to the contrary, a review of the infringing passages makes clear that quotation of virtually none of the passages are even arguably necessary to convey "pertinent historical facts," and there is no basis for the claim that copyright law has been used here to suppress facts or ideas. *See* A.20 (panel opinion discussing distinction between idea and author's expression of an idea).

too does New Era, as Mr. Hubbard's successor, retain the "right not to speak" by not publishing works already written by Mr. Hubbard.

C. This Case Has Nothing to Do With Personal Privacy

Throughout this litigation, New Era has found itself in the bizarre position of repeatedly stating that this case has nothing to do with privacy rights, and yet facing continuous arguments from Holt, the district court and the concurrence below rejecting a privacy position purportedly asserted by New Era.[35] Once again, New Era asserts that nothing in this case turns on privacy rights. This case is governed by *copyright* law, and the rights of the copyright holder do not turn on the privacy interests that do or do not exist in any particular case.[36]

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35 In the district court, in response to arguments raised by Holt, New Era stated, "This is a copyright case, . . . not a privacy case. . . The absence of a personal privacy interest is irrelevant to the copyright *property* rights at issue here. Defendant, of course, cites no modern *copyright* case turning on privacy." Pl. Memo at 46. Nevertheless, the district court stated that New Era had alleged a privacy interest, and then rejected this purported argument because "protection of privacy is not the function of our copyright law." (A.85-86), a proposition with which New Era agrees. In the court of appeals, New Era again asserted that privacy issues are irrelevant to copyright law. While the majority properly ignored this issue, the concurring judge also mistakenly attributed such an argument to New Era, and then properly rejected the relevance of a privacy issue here (A.30 n.4).

36 Holt suggests that this case is different than *Salinger*, 811 F.2d 90, because "*Salinger* was tacitly influenced by concerns for Mr. Salinger's personal privacy." Pet. at 54. However, in his dissent from the denial of rehearing en banc, Judge Newman, the author of the *Salinger* opinion, while suggesting some changes to that opinion, ignored the privacy issue altogether, despite Holt's clamoring for a privacy distinction between this case and *Salinger*. *See also* Newman, *Copyright Law and the Protection of Privacy*, 12 Colum.-VLA J.L. & Arts 459, 460 n.2 (1988) (Manges lecture by Judge Newman, in which he denies that privacy issues were relevant to the decision in *Salinger*).

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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